86 1785

No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL COHL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

KENNETH R. SASSE
1900 Penobscot Building
Detroit, Michigan 48226
Telephone: (313) 965-6775
Counsel for Petitioner

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTIONS PRESENTED

I.

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY INFORMATION UNTIL JURY DELIBERATIONS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW.

II.

WHETHER A DISTRICT COURT, PRIOR TO SENTENCING, ENTRY OF JUDGMENT, AND APPEAL, RETAINS JURISDICTION TO RE-CONSIDER THE DENIAL OF A MOTION FOR NEW TRIAL.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding before the United States Court of Appeals for the Sixth Circuit were as follows:

(1) United States of America — Plaintiff-Appellee;
(2) Michael Cohl — Defendant-Appellant;
(3) Charles Gregory, Sr. — Defendant-Appellant; and,
(4) Sanford Cohl — Defendant-Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, Statutes and Rules:

No. _____

In The

Supreme Court of the United States

October Term, 1986

MICHAEL COHL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, MICHAEL COHL, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The orders of the court of appeals affirming Petitioner's conviction (App. A, *infra*, A-1 – A-4) and denying rehearing (App. B, *infra*, B-1) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1987. (App. A, *infra*, A-1). A petition for rehearing was denied on March 6, 1987. (App. B, *infra*, B-1). This petition is being filed within sixty (60) days of that date as required by Supreme Court Rule 20.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

Rule 33 of the Federal Rules of Criminal Procedure provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

1. Petitioner was indicted in the United States District Court for the Eastern District of Michigan. A superseding indictment alleged the involvement of Petitioner and seven others in the interstate transportation of stolen property having a value in excess of $5,000, *i.e.*, stainless steel ingot butts.[1] A jury trial began on April 30,

---

[1] Count One of the indictment alleged a conspiracy to transport stolen property, with a value in excess of $5,000, in interstate com-

(*concluded on page 3*)

1985 and concluded with Petitioner being found guilty on 15 of the 20 counts charging him.[2]

Petitioner was sentenced on January 17, 1986 to a custody term of four years on each count, the sentences to run concurrently. He was also ordered to pay a committed fine of $2,000 on each count, for a total fine of $30,000. (C.A. 75)

An unsecured appeal bond was granted at the time of sentencing. (C.A. 75) On April 8, 1987, the district court continued the unsecured bond pending application for certiorari. The district court found the application presented a "substantial question" of law likely to result in reversal, or an order for new trial, within the meaning of 18 U.S.C. § 3143(b).

2. Petitioner, his brother Sanford Cohl, and William Gregory, Sr. owned SMC Hauling Co. ("SMC"). On October 9, 1978, SMC entered into a contract with the Jones & Laughlin Steel Co. ("J&L") in Warren, Michigan. SMC was required to remove the slag (the impurities that rise to the top of the metal during the steel making process) from J&L and take it to SMC's dumpsite. The entire cost of manpower, dumptrucks, the dumpsite, and all other expenses were to be borne by SMC. In ex-

---

(*continued from page 2*)

merce, in violation of 18 U.S.C. §§ 371 and 2314. Counts Two through Twenty each alleged an interstate transportation of stolen property having a value in excess of $5,000. Petitioner was charged in all twenty counts.

[2] Petitioner and co-defendant Charles Gregory, Sr. were convicted on Counts One-Six and Eight-Sixteen. They were acquitted on Counts Seven and Counts Seventeen-Twenty. (C.A. 75-76) Co-defendant Sanford Cohl was convicted on Counts One-Three and acquitted on Counts Four-Six. (C.A. 74) Judgments of acquittal were entered as to co-defendants Chester Harris and Saul Tugal. (T. 5/28/85 62, 82-83) ("C.A." refers to the Appendix filed in the court of appeals. "T." refers to the trial transcript.)

change, SMC could pick over the slag and remove steel left in the slag during J&L's steelmaking process. The amount and size of the steel that J&L could remove from the slag prior to its being picked up by SMC was to be determined by "historically, past-established practice." (C.A. 787-793)

This case arose because of removal of "ingot butts" by SMC from J&L. During the stainless steel making process at J&L, melted steel was poured into molds to make "ingots" which averaged approximately 12½ tons each. Six to eight ingots were produced in a "run". Melted steel that was left after a "run" was poured into a mold to form a partial "ingot", called an "ingot butt". (T. 4/30/85 202-203)

The government established that a number of "ingot butts" had been removed by SMC from J&L. Joseph Piccioni and Robert Visokey, J&L's plant managers, testified that SMC was not entitled to remove these ingot butts under its contract with J&L. (T. 5/1/85 85; 5/2/85 19, 22) It was also established that SMC was making payments of from $500 to $2,000 to Ronald Schmidt, Evraisto Nino and Wallace Gutowski, J&L employees responsible for loading the ingot butts on SMC's trucks. (T. 5/2/85 112; 5/3/85 108-111)

Petitioner and his co-defendants did not deny that ingot butts were being removed from J&L by SMC, or that payments were being made to J&L personnel. They maintained, however, that SMC was entitled to the ingot butts under its contract with J&L. There was testimony that ingot butts had been removed with the slag taken from J&L since the early 1970's, when Varney Trucking Co. hauled the slag. (T. 5/28/85 137) It was also established that Petitioner and his co-owners at SMC had repeatedly asserted their right under the contract, to J&L management, to any metallic pieces that could be

handled by the loader, *i.e.*, any pieces under 15 tons in weight. (T. 5/1/85 102-104, 126-128) Petitioner and his co-defendants did not deny the payments to J&L personnel, but maintained they acceded to the demands for "gifts" to receive the steel that had historically been included in the slag and to which they were entitled under the contract. In addition to the cash payments to Schmidt, Nino, and Gutowski, evidence established that top management at J&L was also receiving "gifts" from SMC. Given to J&L management were television sets, gold coins, golf clubs, firearms, trips, expensive crystal, and numerous other "gifts". (T. 5/1/85 95-98, 208-210; 5/3/85 214-237)

Motions for judgment of acquittal, arguing insufficient proof that SMC was not entitled to the ingot butts under the contract with J&L, were denied. Although finding that there were "very close questions of fact", the district court held that the testimony of J&L management that ingot butts were not included in the contract was sufficient to create an issue of fact for the jury. (T. 5/29/85 84-85)

3. To establish that $5,000 in stolen ingot butts had been transferred in interstate commerce, as required for conviction on each count, the government relied on invoices of sales and the testimony of Norman Reese.

Invoices from various out-of-state sales of steel between December, 1979 and November, 1981 were introduced. These documents showed sales on 19 occasions in amounts from $5,742 to $11,980 (C.A. 799-957)

The government relied on Norman Reese to establish that the various shipments were of ingot butts rather than of some other scrap metal or of a combination of ingot butts and other scrap metal. As foreman at SMC, Reese had supervised the various shipments. He testified

pursuant to an immunity agreement with the government. (T. 5/21/85 115, 156) Although admitting he could not remember the individual shipments, Reese used the weights on the invoices to testify about the composition of the various loads. He testified that each of the loads contained ingot butts; he referred to them as "ingots" and "butt ends". (T. 5/22/85 67-90) Reese denied that any of the loads could contain a combination of ingot butts and "caps", another form of stainless steel that SMC acquired from the J&L slag. He claimed that they did not mix ingot butts and caps in the loads that went out of state. (T. 5/22/85 178, 182)

4. Jury deliberations began on May 31, 1985. (T. 5/31/85 230) On June 5, 1985, counsel convened in response to a note from the jury. The response to this note was concluded at 9:10 a.m. The jury returned its verdict at 10:45 a.m. (T. 6/5/85 5) At some point prior to the return of the verdict, the prosecutor admitted that Norman Reese had changed his testimony, with respect to the invoices, from an earlier time when he had told the government that the "loads" were something different than what he told the ~~jury~~. (Motion for New Trial, C.A. 94) The prosecutor subsequently admitted that Reese had previously told them, during two conversations prior to trial, that ingot butts and caps were mixed in out-of-state loads. Further, Reese had specifically identified a number of loads that were the subjects of the indictment as containing, in whole or in part, stainless steel caps. (Government's Answer in Opposition to Defendants' Motion for New Trial, C.A. 116)

5. During the stainless steel making process, the impurities, referred to as "slag", rise to the top. The slag is poured off into a slag pot. Any metal within the slag goes to the bottom of the slag pot. When it solidifies it is referred to as a "cap". (T. 4/30/85 207-208) Caps were

part of the J&L refuse stream. They were a part of the pit scrap that was indisputedly a part of the contract between SMC and J&L. (T. 5/2/85 22) There was testimony that J&L should have retained the "large" caps and that they should not have gone to SMC under the contract. (T. 5/1/85 192-193) There was, however, no evidence that SMC received any caps from J&L to which they were not entitled.

The invoices in this case established the shipments of stainless steel with values from approximately $5,000 to $11,000. If the shipments all contained only stolen steel (*i.e.*, ingot butts), the $5,000 jurisdictional amount was met. If, however, the shipments contained some stolen steel and some steel that was not stolen (*i.e.*, caps), without any real evidence as to what each shipment contained, there would not be sufficient proof of the $5,000 amount.

6. The district court initially denied Petitioner's motion for a new trial.(T. 7/22/85 32-33) However, after having an opportunity to consider the decision of this Court in *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985), the district court concluded that the withholding of the exculpatory information concerning the testimony of Norman Reese required the granting of a new trial. (T. 8/8/85 1-2; C.A. 127)

On November 12, 1985, the district court withdrew the order of a new trial. This order was not based on any belief by the court that a new trial was not required by due process. Rather, the district court accepted the government's argument that, having initially denied the motion for new trial, there was no longer jurisdiction in the district court to grant a new trial. (App. D, *infra*, D-1)

7. The court of appeals affirmed Petitioner's conviction in an unpublished per curiam order. The court,

without explanation, stated that Petitioner and his co-defendants had "failed to demonstrate . . . the materiality of, or prejudice from, the tardy disclosure." (App. A, *infra*, A-2). The court of appeals also concluded that the district court had no authority to grant a new trial "in the absence of a motion from a defendant." (*Id.*). The court of appeals did not discuss the effect of the motion for new trial that had been timely filed.

REASONS FOR GRANTING THE PETITION

1. This Court has repeatedly emphasized that due process is violated when the prosecutor obtains a conviction aided by the failure to disclose exculpatory evidence. The Court has never, however, considered the time at which the disclosure of exculpatory evidence must be made. This case, involving disclosure of material exculpatory evidence during the fourth day of jury deliberations — and shortly before the verdict was returned — presents an opportunity for this Court to provide some guidance regarding the time at which disclosure must be made.

a. In a series of cases, this Court has held that due process is violated by the prosecutor's deliberate solicitation of false testimony, the prosecutor's failure to correct false testimony, and the prosecutor's withholding of exculpatory evidence. The inaction of the prosecutor here, in the face of testimony he knew differed significantly from earlier statements, denied Petitioner the due process of law that the cases of this Court had guaranteed to him.

This Court first held that "a deliberate deception of Court and jury by the presentation of testimony known to be perjured" violated the due process requirement in *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935). In *Pyle* v.

Kansas, 317 U.S. 213 (1942), the Court held allegations of the knowing use of perjured testimony, and suppression of favorable testimony, if proven, would be a violation of the Constitution. Likewise, a judgment of conviction was reversed in *Alcorta* v. *Texas*, 355 U.S. 28 (1957), when the prosecutor elicited testimony he knew was untrue and failed to disclose exculpatory evidence.

More recently, the Court has emphasized the prosecutor's duty to correct false testimony even if he did not solicit it. In *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), the Court held that due process was violated where the prosecutor "although not soliciting false evidence, allows it to go uncorrected when it appears." The *Napue* holding was reaffirmed in *Giglio* v. *United States*, 405 U.S. 150 (1972), where the Court held that a defendant is entitled to a new trial if he can establish that the prosecutor intentionally or inadvertently failed to correct materially false testimony relevant to the credibility of a key government witness.

b. The prosecutor in this case was informed, prior to trial, that witness Norman Reese maintained that loads of stainless steel contained both ingot butts and caps. Indeed, apparently believing SMC was not entitled to caps, the prosecutor alleged that various shipments contained caps in the superseding indictment. (Counts Four, Five, Six, Eight and Eleven; C.A. 26) When the proofs failed to establish that any caps were illegally removed from J&L, however, the prosecutor elicited, without any attempt at correction, testimony from Reese, that each of the shipments contained only ingot butts. (T. 5/22/85 67-90) During cross-examination, the prosecutor remained silent while Reese expressly denied that any of the loads contained both ingot butts and caps. (T. 4/22/85 178, 182)

Reese was an important witness for several reasons. As the person who made payments to Nino, Schmidt and Gutowski, he was in a unique position to help characterize the payments as being a bribery for providing stolen steel, as claimed by the prosecutor, or as being part of the cost of doing business with J&L and a demand that had to be met to obtain the steel that SMC was entitled to receive, as maintained by the Petitioner. Reese was also important, as to co-defendant Sanford Cohl, because he was the only witness to suggest that Sanford Cohl was even aware of the payments to J&L employees. Most importantly, however, Reese was the only witness who provided substantial testimony regarding the various shipments of steel in interstate commerce.

Reese admittedly did not recall the individual shipments. If some of the shipments contained mixtures of butt ends and caps, Reese's ability to identify any particular shipment as containing over $5,000 worth of butt ends became highly questionable.

A reasonable probability existed that, had Reese's earlier statement been disclosed, the result of the trial would have been different. The evidence was "material" within the meaning of *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985). The district court, after reviewing the *Bagley* decision, held that there was a probability of a different outcome sufficient to undermine confidence in the verdict and granted a new trial.

c. This Court has never considered the question of when exculpatory material must be provided to a defendant. The courts of appeals, however, have considered the question a number of times, with mixed results. See *e.g.*, *United States* v. *Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation

and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure"); *Grant* v. *Alldredge*, 498 F.2d 376 (2nd Cir. 1974) (failure to provide pre-trial disclosure of exculpatory material required a new trial); *United States* v. *Murphy*, 569 F.2d 771 (3rd Cir. 1978) (government may be required to produce exculpatory material prior to the time disclosure required by the Jencks Act); *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967) (disclosure must be made at a time when the disclosure will be of value to defendant); *United States* v. *McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been"); *United States* v. *Moore*, 439 F.2d 1107, 1108 (6th Cir. 1971) ("*Brady* was never intended to create pretrial remedies"); *United States* v. *Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979) ("As long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of the evidence, Due Process is satisfied"); *Blake* v. *Kemp*, 758 F.2d 523, 532, n. 10 (11th Cir. 1985) (under some circumstances exculpatory information must be disclosed pretrial); see also, ABA Standards for Criminal Justice, § 3-3.11(a) (2d ed. 1982) (disclosure required "at earliest feasible opportunity").

d. The opinion of the court of appeals states that "no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial." (App. A, *infra*, A-2). The suggestion that defense counsel has waived Petitioner's rights by failing to act during the jury deliberations, never raised before the district court, is not convincing.

First, the record does not disclose that Petitioner's counsel was made aware of the specific information that Norman Reese had previously provided the prosecutor until the filing of the government's response to the motion for new trial, filed after the return of the verdict. The only disclosure prior to the verdict was the general admission by the prosecutor that Reese had changed his testimony with respect to the loads from what he had earlier informed the government. See "Motion for New Trial". (C.A. 94) Even if Petitioner's counsel had been fully advised of the specifics regarding Reese's earlier statement, however, it was far too late to correct the prosecutor's actions.

The decision of the court of appeals here is in direct conflict with that reached in *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967). In *Hamric*, disclosure of exculpatory evidence also occurred after the jury began deliberations. Habeas relief was granted:

> Finally, on the issue of suppression, we conclude that disclosure of the undisclosed evidence after the jury had retired was too late to overcome the requirements of *Brady*. If it is incumbent on the State to disclose evidence favorable to an accused, manifestly, that disclosure to be effective must be made at a time when the disclosure would be of value to the accused. Possibly the jury's deliberations could be interrupted for the purpose of taking additional testimony, but the potential prejudicial effect to an accused of such an extraordinary procedure persuades us that *Brady*, to be given vitality, must be interpreted to require disclosure, at least, before the taking of the accused's evidence is complete.

Hamric v. *Bailey*, *supra* at 393.

e. Petitioner requested disclosure of exculpatory evidence both before and during his trial.

Prior to trial, the district court ordered the prosecution to provide all exculpatory information within its possession to the defendants "on a continuing basis." The prosecution did not oppose this order. (T. 3/12/85 99)

While Norman Reese was testifying, Petitioner's counsel again requested disclosure of exculpatory evidence. Petitioner's counsel, prophetically stating his fear that the prosecutor's perception of his duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963) were "fundamentally flawed", specifically requested any exculpatory information contained within statements to the prosecutor that were not reduced to writing. (T. 5/22/85 7, 15) Earlier, the prosecutor had informed the court that he had reinterviewed many witnesses in preparation for trial and had "extended the courtesy" of telling defense counsel statements that had come to their attention during these interviews. (T. 5/2/85 27) With respect to his interview of Norman Reese, however, the prosecutor elected to wait until well into jury deliberations to first "extend the courtesy" of telling counsel of highly exculpatory information.

The disclosure here was too little and too late. The government utterly failed to meet its due process obligations. It should not have been permitted, in the court of appeals, to shift the blame to Petitioner's counsel and, in so doing, to deny Petitioner his constitutionally guaranteed fair trial.

2. The courts below held a denial of a motion for new trial could not be reconsidered by the district court. This holding is unsupported by statute, court rule, caselaw, or arguments of public policy. It is contrary to the

established right of a court to reconsider an erroneous order prior to sentencing, entry of judgment and appeal.

The district court initially denied Petitioner's timely-filed motion for new trial. (T. 7/22/85 32-33) The denial occurred without the court having the opportunity to consider *United States* v. *Bagley*, 473 U.S. __, 105 S.Ct. 3375 (1985). After reconsidering the importance of the undisclosed information, and considering the *Bagley* opinion, a new trial was granted. (T. 8/8/85 1-2; C.A. 127)

Had the district court originally granted a new trial, the court would, of course, have been permitted to reconsider its order and later deny the new trial. The court would have been free to do so until jeopardy attached at the new trial. See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979); *United States* v. *Spinella*, 506 F.2d 426 (5th Cir. 1975); *United States* v. *Arrington*, 757 F.2d 1184 (4th Cir. 1985).

A district court does not have authority to grant a motion for new trial in the absence of a motion from the defendant. See, *e.g.*, *United States* v. *Green*, 414 F.2d 1174 (D.C. Cir. 1969); *United States* v. *Vanterpool*, 377 F.2d 32 (2nd Cir. 1967); *United States* v. *Brown*, 587 F.2d 187 (5th Cir. 1979); see also, Fed.R.Crim.P. 33. This is because a defendant should not be forced into a second trial, even if convicted at the first trial, if he does not want a new trial. Indeed, double jeopardy protections would likely protect a defendant from the second trial. Here, however, Petitioner moved for a new trial. He could hardly claim that he did not want the trial or that double jeopardy interests were violated.

The district court's reconsideration of the denial of the new trial motion occurred prior to sentencing, entry of judgment or appeal. Compare *United States* v. *Smith*, 331

U.S. 469 (1947) (court could not reconsider denial of new trial motion after appeal; appellate opinion would become merely "advisory"). No reason exists in law or logic to deny the district court the authority to do so.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

By: /s/ KENNETH R. SASSE
Attorney for Petitioner
1900 Penobscot Building
Detroit, Michigan 48226
Telephone: (313) 965-6775

Dated: May 4, 1987

APPENDICES

• • •

APPENDIX A

OPINION

(United States Court of Appeals for the Sixth Circuit)

(Filed January 19, 1987 — John P. Hehman, Clerk)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

(UNITED STATES OF AMERICA, **Plaintiff-Appellee**, v. MICHAEL COHL (86-1127), CHARLES GREGORY, SR. (86-1128), SANFORD COHL (86-1129), **Defendants-Appellants** — **ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN — **Nos. 86-1127; 86-1128; 86-1129**)

BEFORE: **KENNEDY** and **NORRIS**, Circuit Judges; and **CONTIE**, Senior Circuit Judge.

PER CURIAM. *NOT FOR PUBLICATION*

Defendants appeal from their convictions resulting from charges of conspiracy and transportation of stolen goods in interstate commerce. In essence, defendants were charged with participating in a scheme which involved bribing employees of a steel company to furnish defendants with valuable stainless steel ingots and butts, to which they were not entitled under a slag-hauling contract between the steel company and a hauling company owned and operated by defendants, and then selling that steel in interstate commerce.

All defendants contend that the government's failure to furnish them an alleged inconsistent and exculpatory statement made by a government witness, Norman Reese, entitles them to a new trial, citing *Brady* v. *Maryland*, 373 U.S. 83 (1963). Defendants' contention arises out of a conversation they say occurred between defense counsel and government attorneys, while the jury was deliberating, in which the latter advised the former that Reese's testimony, that ingot butts and caps were never mixed in a load, was different from the version of the facts he had given the government and which had served as the basis for the counts of the indictment which detailed mixed loads.

However, as defense counsel concede, this revelation was made in the course of an off-the-record conversation and no attempt was made to preserve the conversation in the record. Furthermore, no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial. Accordingly, defendants have failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure. *See, e.g., United States* v. *Holloway*, 740 F.2d 1373 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984).

Nor is the issue raised by all defendants, that the district court erred in vacating its *sua sponte* order which had the effect of granting a new trial, well taken. The district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant. *See* 3 C. Wright, *Federal Practice and Procedure* § 551 (West 1982); Fed. R. Crim. P. 33 advisory committee's note (1966 amendment).

Defendant Sanford Cohl contends that the trial court erred in overruling his motion for judgment of acquittal, as there was insufficient evidence of guilt to sustain a conviction on the charges against him.

> In testing the sufficiency of the evidence to withstand a motion for judgment of acquittal, the trial judge does not pass upon the credibility of the witnesses or the weight of the evidence. On the contrary, he must view the evidence and the inferences that may justifiably be drawn therefrom in the light most favorable to the Government. If, under such view of the evidence he concludes that a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion should be overruled and the issue left to the jury. It is only where under such view of the evidence he concludes there must be such a doubt in a reasonable mind, should the motion be granted. (Citations omitted.)

United States v. *Conti*, 339 F.2d 10, 13 (6th Cir. 1964).

In reviewing the denial of a motion for judgment of acquittal, the test to be applied by this court is whether reasonable minds could reach different conclusions on the issue of whether the defendant was guilty beyond a reasonable doubt. In other words, it is only where reasonable minds could not fail to find reasonable doubt that a reviewing court may reverse the district court's denial of the motion.

In view of the testimony of Norman Reese concerning Sanford Cohl's direct involvement in the scheme and of his knowledge of business transactions, other evidence that Cohl was present during contract negotiations and was involved in the day-to-day operation of companies which dealt with the shipments, and the inferences of guilt which reasonably may be drawn from that evidence, we are unable to say that reasonable minds

could not find Sanford Cohl guilty beyound a reasonable doubt.

Accordingly, the judgments are **affirmed**.

ISSUED AS MANDATE: March 17, 1987

COSTS: NONE

(*Certification Omitted*)

APPENDIX B

ORDER DENYING REHEARING

(United States Court of Appeals for the Sixth Circuit)

(Filed March 6, 1987 — John P. Hehman, Clerk)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL COHL (86-1127), CHARLES GREGORY, SR. (86-1128), SANFORD COHL (86-1129), Defendants-Appellants — No[s]. 86-1127/8/9)

BEFORE: KENNEDY and NORRIS, Circuit Judges, and CONTIE, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

APPENDIX C

ORDER DENYING NEW TRIAL

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed July 23, 1985)

(UNITED STATES OF AMERICA, Plaintiff, -vs- MICHAEL COHL, ET AL., Defendants — CRIMINAL NO. 84-20539; HONORABLE ANNA DIGGS TAYLOR)

At a session of the United States District Court at the Federal Building and United States Courthouse, Detroit, Michigan, on July 23, 1985.

PRESENT: HONORABLE ANNA DIGGS TAYLOR,
United States District Judge

This matter having come before the Court on defendants' Motion for a New Trial, the Court being duly advised in the premises and finding that there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial,

Now, therefore, IT IS ORDERED that defendants' motion be and hereby is denied.

/s/ HONORABLE ANNA DIGGS TAYLOR
United States District Judge

Entered: July 23, 1985

APPENDIX D

ORDER SETTING ASIDE PREVIOUS ORDER DENYING NEW TRIAL, AND GRANTING SAME

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed August 12, 1985)

(UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL COHL, SANFORD COHL, CHARLES GREGORY, Defendants — Criminal No. 84-20539; Hon. ANNA DIGGS TAYLOR)

At a session of said Court held in the Federal Building, Detroit, Michigan, on: August 12, 1985.

Present: Hon. ANNA DIGGS TAYLOR,
U.S. DISTRICT JUDGE

This matter having originally come before the Court on the Motion for New Trial filed by Defendants MICHAEL COHL, SANFORD COHL and CHARLES GREGORY, and the Court having denied said motion by Order dated July 23, 1985; and

The Court having reconsidered the issue raised in Defendants' Motion for New Trial *sua sponte*; and

The Court having reconvened the parties in open court on August 8, 1985, for the purpose of stating its decision on reconsideration;

NOW THEREFORE, for the reasons stated on the record in open court on August 8, 1985,

IT IS HEREBY ORDERED that the Court's previous Order denying Defendants' Motion for New Trial is

hereby set aside, and that the Defendants' Motion for New Trial be, and the same is hereby granted.

/s/ ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX E

ORDER GRANTING GOVERNMENT'S MOTION FOR RECONSIDERATION AND VACATING ORDER GRANTING NEW TRIAL

(United States District Court —
Eastern District of Michigan — Southern Division)

(Dated November 12, 1985)

(UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL COHL, et al., Defendants — CASE NO. 84 20539; HONORABLE ANNA DIGGS TAYLOR)

On June 5, 1985, defendants Michael and Stanley [*sic*, Sanford] Cohl and Charles Gregory, Sr. were convicted of conspiracy to transport stolen property in interstate commerce and multiple counts of transporting stolen property in interstate commerce. On June 19, 1985, after a request for an extension of time to file a motion for new trial was granted, defendants filed a motion for new trial alleging that the government had failed to disclose the substance of an inconsistent oral statement of Norman Reese, the prosecutor's main witness. Federal Rule of Criminal Procedure 33 provides in part that:

> [t]he court on motion for a defendant may grant a new trial to him if required in the interest of justice . . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within 7 days after verdict

> or finding of guilty or within such further time as the court may fix during the 7-day period.

The prosecution opposed the motion on July 1, 1985 and asserted that the non-disclosure did not deprive defendants of a fair trial and the information would only provide cumulative impeachment material since Reese had been extensively impeached at trial.

On July 22, 1985 the court heard oral argument on defendants' motion and found that the information would not have affected the outcome of the trial. An appropriate order was entered on July 23, 1985.

At the request of the court, counsel for both parties appeared in open court on August 8, 1985. The court advised counsel that it had, since entry of its last order, determined to grant reconsideration of its July 23rd order, based upon *United States* v. *Bagley*, 105 S.Ct. 3355 (1985), which holds that "suppression of [Brady] evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial . . . and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence of the outcome of the trial." The court announced its conclusion that the evidence withheld did indeed undermine its confidence that defendants would nevertheless have been convicted, granted defendants' prior motion and ordered a new trial. The order was entered on August 12, 1985.

The prosecution filed this motion for reconsideration of the decision to grant a new trial on August 23, 1985. The prosecution contends that the court erroneously *sua sponte* ordered a new trial. *Sua sponte* orders of a new trial are prohibited, it argues. *See United States* v. *Smith*, 331 U.S. 469, 475 (1947). In addition, the notes of the advisory committee indicate that "[t]he amendments to

the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant."

Defendants argue that the government's motion is untimely under Eastern District of Michigan Local Rule 17(k)(1). Rule 17(k)(1) states that "any motion to alter or amend a judgment and any motion for rehearing or reconsideration shall be served no later than 10 days after entry of such judgment or order." Defendants further aver that the court correctly granted a new trial in accordance with the *Bagley* decision. The prosecution's motion is untimely according to the Local Rules. It was filed one day after the time for such a motion had expired.

But, after the time for filing of a defense motion for reconsideration had passed, this court no longer had jurisdiction to even grant a new trial under the Local Rules, and that time had lapsed when the parties met here in open court, on August 8th.

This court is bound by the Local Rules as well as the Federal Rules of Criminal Procedure which "make no provision for rehearing and modifying or setting aside an order entered through mistake." *United States* v. *Farrah*, 715 F.2d 1097, 1099 (6th Cir. 1983), *quoting United States* v. *Jerry*, 487 F.2d 600, 604 (3rd Cir. 1973). In *Farrah*, the prosecution filed a petition for rehearing two weeks after the court had permitted the defendant to withdraw his guilty plea because defendant contended that he had not fully understood the penalty he could possibly receive for the offense to which he pleaded guilty. At the conclusion of the hearing on the motion to reconsider, the district court judge reversed his decision to withdraw his plea and reinstated the guilty plea. The *Farrah* court cited *Jerry* and held that the district court did have the

authority to reconsider its order and that the court had correctly rescinded its order permitting the defendant to withdraw his plea since the record showed that defendant did understand correctly the length of incarceration he faced.

By analogy, this court holds that it does have the authority to vacate its order of August 12, 1985 and justice requires that this court vacate the order. There is uniform case law that a court does not have jurisdiction to grant an untimely motion for new trial or a subsequent motion regarding a new trial that is untimely. As the court was without jurisdiction, the order granting the motion was *sua sponte* and such orders are prohibited. *United States* v. *Smith*, 331 U.S. 469, 475 (1947); *United states* v. *Mills*, 54 FRD 497, 498 (D.C. Tenn.), *aff'd*, 456 F.2d 1111 (6th Cir. 1972). The notes of the advisory committee which follow Rule 33 of the Federal Rules of Criminal Procedure expressly preclude *sua sponte* orders for new trials. Thus, this court's order of August 12, 1985 is a nullity. *United States* v. *Green*, 414 F.2d 1174, 1175 (D.D.C. 1969).

IT IS HEREBY ORDERED that for the reasons stated in this order, the court grants the government's motion for reconsideration, vacates its order of August 12, 1985, and reinstates the order of July 23, 1985 which denied defendants' motion for new trial.

IT IS SO ORDERED.

/s/ ANNA DIGGS TAYLOR
U.S. District Judge

Dated: November 12, 1985